No. 85-1581

In the Supreme Court of the United States

OCTOBER TERM, 1985

RICHARD SOLORIO
YEOMAN FIRST CLASS, U.S. COAST GUARD, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT.

BRIEF OF DEFENSE APPELLATE DIVISION, UNITED STATES ARMY, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

I. WHETHER it is constitutionally permissible for the military to exercise court-martial jurisdiction over an offense which, upon application of the detailed analysis mandated by this Court, is not "service connected".

II. WHETHER any cogent or compelling reasons exist for the Court of Military Appeals to depart from a detailed application of the "service connection" test set forth by this Court in *O'Callahan* and *Relford*.

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The parties have consented to the submission of this *amicus curiae* brief by the Defense Appellate Division in support of the petitioner. Copies of the consents have been filed with the court.

INTEREST OF THE DEFENSE APPELLATE DIVISION

The Defense Appellate Division represents soldiers before the U.S. Army Court of Military Review, the U.S. Court of Military Appeals and the U.S. Supreme Court pursuant to Article 70(c), Uniform Code of Military Justice [hereinafter cited as UCMJ], 10 U.S.C. § 870(c) (Supp. 1986). The Division is the principal source of appellate representation for all convicted Army soldiers who are sentenced to a punitive discharge or confinement for one year or more. Defense Appellate Division attorneys typically represent over 2000 soldiers before the U.S. Army Court of Military Review annually.[1] The U.S.

[1] In 1984 and 1985 the Defense Appellate Division represented 2840 and 2241 soldiers, respectively, before the Army Court of Military Review. Defense Appellate Division, 1984 and 1985 Annual Reports. *See generally* Court of Military Appeals Annual Report and Appellate Reports of the Armed Services, 20 M.J. LXXV – LXXIX (1984) (Comparing appellate dockets of the Court of Military Appeals, the Courts of Military Review and the military appellate agencies).

Army is the largest armed service, having an active duty strength of 786,719 members for fiscal year 1985.[2] The Defense Appellate Division represents soldiers who have been[3] and will be adversely affected by the decision of the U.S. Court of Military Appeals in this case. If permitted to stand, the decision in this case will cause an expansion in the number of cases tried by the military and will potentially deprive a significant number of soldiers of fundamental rights and protections they would have enjoyed if prosecuted in Article III courts.

STATEMENT OF THE CASE

The facts of this case are fairly discussed in the decision of the Court of Military Appeals, 21 M.J. 251 (C.M.A. 1986) and the decision of the Coast Guard Court of Military Review, 21 M.J. 512 (C.G.C.M.R. 1985).

Summary of Argument

The military judge correctly identified the relevant service connection factors involved in this case and concluded that the military lacked jurisdiction over petitioner's Alaskan offenses. By manipulating the intent of the Court when it developed the service connection test, the United States Court of Military Appeals affirmed the lower court's reversal of the military judge and unconstitutionally found military jurisdiction over the Alaskan offenses. The lower courts failed to present any constitutionally convincing reasoning to justify departure from the traditional service connection test. This case is an example of the lower courts' recent decision to abandon a conscientious application of the service connection

[2] U.S. Army Courts-Martial/NJP Statistics, Report of The Judge Advocate General of the Army, submitted as part of the annual report of the U.S. Court of Military Appeals for fiscal year 1985, ___ M.J. ___ (1985).

[3] The government recently appealed one case which was dismissed at trial for lack of subject matter jurisdiction. Based on the decision below, the Army Court of Military Review reversed the military judge's ruling and reinstated the charges. United States v. Abell, Misc. Docket No. 1986/1 (A.C.M.R. 11 March 1986) (unpub.) (Appendix), *pet. for review filed*, 21 M.J. 114 (C.M.A. 1986).

test and embark on an aggressive campaign to expand military jurisdiction beyond that intended by the Court and the Constitution.

The Court should reaffirm the service connection test as the constitutionally correct standard to be applied in determining military jurisdiction. A test balancing the constitutional rights of the individual soldier against the needs of the military properly reflects the intent of the framers of the constitution. Courts-martial do not accord an accused the same constitutional rights as Article III courts and, by their very nature, are subject to a degree of command influence that may rise to an unlawful level. The service connection test has not caused a decrease in military discipline, in fact, military recruitment and discipline have steadily increased over the last ten years. The lower court's additional factors of victim's rights and judicial economy do not justify a deviation from the service connection test and should not be considered when determining whether to deprive a serviceman of important constitutional rights.

I. THE DECISION BELOW CANNOT BE SUSTAINED UPON FAITHFUL APPLICATION OF THE SERVICE CONNECTION TEST SET FORTH BY THE COURT IN *O'CALLAHAN V. PARKER*.

A. *The Military Judge's Determination That Appellant's Alaska Offenses Were Not Service Connected Was Faithful To The Court's Precedents.*

The decision of the court below cannot be reconciled with the Court's decision in *O'Callahan v. Parker*, 395 U.S. 258 (1969) [hereinafter cited as *O'Callahan*], which limited court-martial jurisdiction to those offenses that are "service-connected." While the Court acknowledged that specialized military courts were necessary, it concluded that, since these courts necessarily denied certain fundamental constitutional rights, they must be limited in scope to "the *least possible power adequate to the end proposed*." *Id.* at 265, *quoting Toth v. Quarles*, 350 U.S. 11, 23 (1955), *quoting Anderson v. Dunn*, 19 U.S. (6 Wheat) 204, 231 (1821) (emphasis supplied by *Toth* Court). Writing for the Court in *O'Callahan*, Justice Douglas

extensively reviewed the history of court-martial jurisdiction and concluded that the historically restrictive approach toward military jurisdiction was not only appropriate but was constitutionally required because "[a] civilian trial . . . is held in an atmosphere conducive to the protection of individual rights, while a military trial is marked by the age-old manifest destiny of retributive justice." *Id.* at 266.

The Court rejected the government's contention that the status of the accused alone was determinative[4] and held that the military did not have jurisdiction to try an Air Force sergeant for the rape of a girl in a civilian hotel. Several factors were identified by the Court in determining that O'Callahan's off-post offenses were not sufficiently service connected to constitutionally permit military prosecution:

> In the present case petitioner was properly absent from his military base when he committed the crimes with which he is charged. There was no connection – not even the remotest one – between his military duties and the crimes in question. The crimes were not committed on a military post or enclave; nor was the person whom he attacked performing any duties relating to the military. Moreover, Hawaii, the situs of the crime, is not an armed camp under military control, as are some of our far flung outposts.
>
> Finally we deal with peacetime offenses, not with authority stemming from the war power. Civil courts were open. The offenses were committed within our territorial limits . . . the offenses did not involve any question of the flouting of military authority, the security of a military post, or the integrity of military property.

O'Callahan, 395 U.S. at 273-274 (footnote omitted).

[4] Prior to *O'Callahan*, the test for determining court-martial jurisdiction was assumed to be "one of status, namely, whether the accused in the court-martial proceeding is a person who can be regarded as falling within the term 'land and naval' forces." Kinsella v. Singleton, 361 U.S. 234, 240-241 (1960).

The Court, in a unanimous opinion, further developed the concept of service connection two years after it was first defined in *O'Callahan*. In *Relford v. Commandant*, 401 U.S. 355 (1971) [hereinafter cited to as *Relford*], the Court identified twelve factors set forth in *O'Callahan* to assess the existence of court-martial jurisdiction and amplified the concept of service connection by articulating nine additional factors. The Court noted that some of the factors applied to the facts in the *Relford* case operated against a finding of jurisdiction, but nevertheless held that military courts had jurisdiction to try an active duty soldier for rape and kidnapping offenses committed on an Army installation. The Court opined that "a serviceman's crime against the person of an individual upon the base or against property on the base is 'service connected' within the meaning of that requirement as specified in *O'Callahan*. . . ." *Id.* at 369.[5]

Application of the service connection analysis set forth in *O'Callahan* and *Relford* to the uncontroverted facts of this case leads inescapably to the conclusion that no measurable or direct service connection exists over the offenses alleged to have been committed by Solorio in Alaska. The military judge, after thoroughly analyzing the facts and conscientiously applying the criteria set forth in *O'Callahan* and *Relford*, properly concluded that Yeoman First Class Solorio's alleged Alaskan offenses were not service connected. *See United States v. Solorio*, 21 M.J. at 252-53. This determination was sound and faithful to the Court's precedents.

B. *The Lower Court's Holding Represents A Sub Rosa Attempt To Overrule O'Callahan.*

The Court of Military Appeals, while disagreeing with the military judge's conclusion, acknowledged that his ruling was

[5] The Court has declined to rule on the issue of whether court-martial jurisdiction existed over a sale of marijuana by an off duty soldier to an undercover military policeman. The Court rejected the defendant's argument that he would be prejudiced by pursuing his claim through the military courts. Schlesinger v. Councilman, 420 U.S. 738 (1975).

consistent with its own precedent.[6] *United States v. Solorio*, 21 M.J. at 254. The court justified its failure to adhere to the doctrine of *stare decisis* by observing that "some of our earlier opinions on service-connection should be reexamined in light of more recent conditions and experience." *Id.* at 254. The only recent development cited by the court to justify a radical departure from its precedents was the increased concern for victims of crimes, *Id.* at 254, a heightened concern far from unique to the military.[7] The court failed to explain how or why this development required a departure from over 15 years of precedent which had clearly delineated the scope of service connection.

Virtually the only *O'Callahan-Relford* factor relied upon by the court to sustain military jurisdiction was the "continuing effect" of the offenses on the victims and their families. This effect was, under the circumstances of this case, no different than the effect any sex crime typically has on any victim and his or her family. There was no showing that the alleged offenses harmed the reputation and honor of the Coast Guard or otherwise had a direct appreciable effect on the service. The service connection identified by the court below was simply too indirect and superficial to support a finding of court-martial jurisdiction based on the accepted traditional application of the service connection test.

The court below appeared to recognize the lack of service connection in this case based on a traditional analysis. The court ignored the explicit *O'Callahan-Relford* factors and cited the pendency of other military charges and the delay by

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[6] *Citing* United States v. McGonigal, 19 C.M.A. 94, 41 C.M.R. 94 (1969); United States v. Shockley, 18 C.M.A. 610, 40 C.M.R. 322 (1969); United States v. Henderson, 18 C.M.A. 601, 40 C.M.R. 313 (1969). *See also* United States v. Adams, 13 M.J. 728 (A.C.M.R. 1982) (although military jurisdiction existed regarding on-post sex offenses, jurisdiction did not exist for off-post sex offenses involving same victim).

[7] Legal articles which discuss the nationwide trend of recognizing the rights of victims include Abrahamson, *Redefining Roles; The Victims Rights Movement*, 1985 Utah L.Rev. 517 (1985); Henderson, *The Wrongs of Victims and Witnesses: New Concerns in the Criminal Justice System*, 30 N.Y.L. Sch.L.Rev. 757-766(1985).

the civilian courts in prosecuting as additional factors supporting military jurisdiction. Nothing in *O'Callahan* or *Relford* suggests that these two considerations are relevant to the service connection inquiry.[8] The omission of these considerations from the service connection analysis is sound.

Any military interest in trying all alleged offenses at the same time does not, and should not, equate to a license to prosecute soldiers for offenses which are not otherwise sufficiently service connected.[9] Even the broadest reading of *O'Callahan* does not imply that the pendency of separate military charges was to be considered as a factor in finding service connection for other unrelated nonmilitary offenses.[10]

Similarly, the fact that a civilian jurisdiction has delayed or deferred prosecution does not rationally support the exercise of military jurisdiction over off-post, civilian-type offenses. One of the *O'Callahan* factors deals specifically with whether "[c]ivil Courts were open." *O'Callahan*, 395 U.S. at 273. The Court in *Relford* amplified this factor and looked to "[t]he presence and availability of a civilian court in which the case

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[8] *See* United States v. Shockley, 40 CMR at 323, in which similar off-post charges were dismissed, even though other service-connected charges existed.

[9] The concept of pendent jurisdiction was developed to avoid unnecessary federal and state *civil* actions stemming from one common set of facts. United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966). Even if a theory of pendent jurisdiction can be applied to criminal cases, the case *sub judice* does not possess a nucleus of common facts. *See* Independant Bankers Ass'n of New York State Inc. v. Marine Midland Bank, N.A., 757 F.2d 453 (2d Cir. 1985). Even assuming, *arguendo*, that the pendency of other charges is relevant to the service connection inquiry, the two sets of offenses in this case were so unrelated in time, place, and circumstances that any benefit to trying all offenses together is negligible and does not outweigh the infringement of petitioner's constitutional rights.

[10] In United States v. Lockwood, 15 M.J. 1, 7 (C.M.A. 1983), the Court of Military Appeals stated that, although the pendency of other military charges does not alone justify military jurisdiction over civilian offenses, it is a factor to be considered in determining service connection. The offenses in this case, however, do not all stem from a common nucleus of facts and therefore the pendency of military charges should not be a factor in determining jurisdiction over unrelated civilian offenses.

can be prosecuted." *Relford*, 401 U.S. at 365. The clear import of both discussions is that military jurisdiction is disfavored when the civilian courts have the capability to prosecute. This factor should not be construed to favor military jurisdiction merely because a local jurisdiction chose not to prosecute or "deferred" prosecution (and all the associated costs) to the military. The constitutional limits of military jurisdiction should not be allowed to fluctuate to accommodate the peculiar whims and changing interests of local jurisdictions. The court below recognized, but failed to fully appreciate, that military authorities will be able to manipulate this factor by obtaining letters of deferral from local prosecutors in a bootstrap effort to gain jurisdiction in areas where it did not formerly attach. *Solorio*, 21 M.J. at 256, 257. In an age of restricted fiscal resources it can be expected that many small jurisdictions will "defer" prosecutions and allow the military to bear the expense of trial.

The new factors cited by the court below are perhaps appealing from a cost-effectiveness standpoint. However, the decision to deprive soldier-citizens of their right to be tried in Article III courts should be based on factors more compelling than economics or convenience.[11] These two factors should not be considered pertinent to the service connection inquiry and the lower court's reliance on them reflects a fundamental misapplication of the teachings of *O'Callahan*.

C. *By Reversing The Lower Court's Holding The Court Will Define What Is Beyond The Boundaries Contemplated By O'Callahan.*

In the present case the Court of Military Appeals has transgressed the "outer limits" contemplated by *O'Callahan* and *Relford*. The Court in *O'Callahan* recognized that the limits of military jurisdiction could only be defined by a case-by-case application of the service connection factors. The Court surely anticipated that periodically it would be necessary to adjust or correct the lower court's definition of the outer

[11] *See, e.g.*, Bounds v. Smith, 430 U.S. 817, 825 (1977) (Although economic factors may be considered, "[t]he cost of protecting a constitutional right cannot justify its total denial"); Mitchell v. Cuomo, 748 F.2d 804 (2d Cir. 1984)(Balance of state prison system's financial and administrative concerns and risk of substantial constitutional harm to inmates tipped decidedly in the inmates' favor).

boundaries of service connection. As Justice Blackmun stated in delivering the opinion of the Court in *Relford*:

> O'Callahan marks an area, *perhaps not the limit*, for the concern of the civil courts and where the military may not enter. The case today marks an area, *perhaps not the limit*, where the court-martial is appropriate and permissible.

Relford, 401 U.S. at 369 (emphasis added). An analysis of the Court of Military Appeals' application of the service connection test indicates that the lower court has transgressed the constitutional boundaries of *O'Callahan*.

The lower court's early commitment to conscientiously apply the Court's guidance is reflected in the following observation:

> What *Relford* makes clear is the need for a detailed, thorough analysis of the jurisdictional criteria enunciated to resolve the service-connection issue in all cases tried by court-martial. A more simplistic formula, while perhaps desirable, was not deemed constitutionally appropriate by the Supreme Court. It no longer is within our province to formulate such a test.

United States v. Moore, 1 M.J. 448, 450 (C.M.A. 1976). The court's detailed application of the jurisdictional criteria enunciated in *O'Callahan* and *Relford* led to determinations of a lack of jurisdiction in a significant number of military cases[12] involving a variety of off-post offenses including the use, sale and transfer of drugs,[13] sex offenses,[14] and property crimes.[15]

[12] *See generally* the cases cited in Annot., 14 A.L.R. Fed. 152, § 20 (1973). *See also* Cole v. Laird, 468 F.2d 829 (5th Cir. 1972).

[13] United States v. Strangstalien, 7 M.J. 225 (C.M.A. 1979); United States v. Conn, 6 M.J. 351 (C.M.A. 1979); United States v. Klink, 5 M.J. 404 (C.M.A. 1978); United States v. Alef, 3 M.J. 414 (C.M.A. 1977); United States v. Williams, 2 M.J. 81 (C.M.A. 1976); United States v. McCarthy, 2 M.J. 26 (C.M.A. 1976). These cases retracted the pre-*O'Callahan* view of the Court of Military Appeals that drug offenses were virtually *per se* service connected. *See* United States v. Beeker, 18 C.M.A. 563, 40 C.M.R. 275 (1969).

[14] United States v. McGonigal, 19 C.M.A. 94, 41 C.M.R. 94 (1969); United States v. Shockley, 18 C.M.A. 610, 40 C.M.R. 322 (1969); United States v. Borys, 18 C.M.A. 547, 40 C.M.R. 259 (1969).

[15] United States v. Hopkins, 4 M.J. 260 (C.M.A. 1978); United States v. Sims, 2 M.J. 109 (C.M.A. 1977); United States v. Hedlund, 2 M.J. 11

In 1980 the court re-examined the restrictive approach it had followed in drug cases and adopted a more expansive view that "[a]lmost every involvement of service personnel with the commerce in drugs is 'service connected.'" *United States v. Trottier*, 9 M.J. 337, 350 (C.M.A. 1980). While recognizing that it was departing from its established analysis of strictly applying the service connection criteria, it opined that a more flexible application of the concept "could be implied" from this Court's opinions. *Id.* at 345.

Three years later, the Court of Military Appeals held that a court-martial had jurisdiction to try a soldier for off-post larcenies committed by using a stolen military identification card. *United States v. Lockwood*, 15 M.J. 1 (C.M.A. 1983). Again admitting that this result was not consistent with its precedents, the court stated that it now attached "considerable importance" to circumstances previously considered insignificant. *Id.* at 10. Understandably perplexed, Judge Fletcher criticized the majority for reconsidering its prior decisions without adequately explaining why the earlier decisions were contrary to the law. Judge Fletcher stated: "The reasons advanced by the majority for jurisdiction resting in the military society seem to be related more to the question of organizational vanity rather than answering a strict question of law. . . ." *Id.* at 10-11. (Fletcher, J., dissenting).

The approach undertaken in the last few years by the highest military court to expand military jurisdiction creates a significant danger that trial and military review courts will abandon conscientious application of service connection criteria and adopt instead a *per se* service connection approach based on the nature of the offenses such as drug use and sex crimes against dependents.[16]

(C.M.A. 1976); United States v. Uhlman, 1 M.J. 419 (C.M.A. 1976); United States v. Camacho, 19 C.M.A. 11, 41 C.M.R. 11 (1969); United States v. Crapo, 18 C.M.A. 594, 40 C.M.R.306 (1969); United States v. Prather, 18 C.M.A. 560, 40 C.M.R. 272 (1969).

[16] Some military courts of review have responded to the Court of Military Appeals' aggressive approach towards broadening military jurisdiction and rendered decisions that infringe upon the borders of service connection. *See*

The case *sub judice* marks the point where the lower court went beyond the boundaries of military jurisdiction. It is imperative that the Court strike the opinion below and provide clear guidance delineating the factors which the lower courts must consider and the outer limit which military courts cannot constitutionally breach.

II. *O'CALLAHAN V. PARKER* WAS CORRECTLY DECIDED AND SHOULD NOT BE MODIFIED OR SET ASIDE.

A. *The Court's Holding In O'Callahan Accurately Interprets the Intent Of The Constitution And Strikes An Appropriate Balance Between The Rights Of An Accused And Military Necessity.*

The Court in *O'Callahan* accurately interprets and harmonizes the provisions of the U.S. Constitution and the Bill of Rights which apply to the question presented. Article III, section 2, of the Constitution declares that "the trial of all crimes . . . shall be by jury: and such trial shall be held in the state where the said crimes shall have been committed." The fifth amendment to the Constitution explicitly excepts cases arising in the military from the requirements of grand jury indictment and trial by jury.[17] The service provision in the fifth amendment implies that a soldier's crime must be service connected in order to deprive him of his right to grand jury indictment and trial by jury. Thus, while Congress undoubtedly has power under Article I of the Constitution to make "rules for the Government and Regulation of the land and naval forces,"[18] this grant of authority must be interpreted in light

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e.g., United States v. Griffin, 21 M.J. 501 (A.F.C.M.R. 1985) (military jurisdiction for off-post rape of one soldier by another); United States v. Householder, 21 M.J. 613 (A.F.C.M.R. 1985) (military jurisdiction for off-post forgery of soldier's signature by another); United States v. Roa, 20 M.J. 867 (A.F.C.M.R. 1985) (military jurisdiction for off-post burglary of officer's home by soldiers who knew officer would be on duty and not at home); United States v. Benedict, 20 M.J. 939 (A.F.C.M.R. 1985) (military jurisdiction for indecent acts committed against minor dependent of soldier off-post by officer).

[17] Cases arising in the land and naval forces have also been judicially excepted by implication from the sixth amendment. Ex parte Quirin, 317 U.S. 1 (1942).

[18] U.S. Const., art I, § 8, cl. 14.

of the express guarantees and implied limitations contained in the Bill of Rights. The only conclusion which can be derived from interpreting the applicable provisions of the Constitution is that the Article I authorization and the fifth amendment exception were intended as limited concessions to military need and not to be used broadly to deprive defendants of the rights they enjoyed at civilian trials.

This limited application is consistent with the history and practice of trial by courts-martial in England and in this country before and at the time of the Revolution. Undoubtedly the framers considered the extent of court-martial jurisdiction under British rule when drafting the Constitution. Prior to the American Revolution, the English court-martial was an example of royal prerogative which was opposed by the parliament. The constant struggle for power between the crown and parliment kept the extent of English court-martial jurisdiction in check.[19]

At the time of the American Revolution, British law held that a soldier could not be tried by court-martial for a civilian offense committed in Britain.[20] When the colonists drafted their own Articles of War in 1775 and 1776, they used the British Articles as a guide and modified the Articles based on their own anti-crown and pro-parliament sentiments.[21] Sections IX and X of the American Articles of War particularly address the conflict between the need for military discipline and the ideal of justice administered by civilians.

Section IX was specifically concerned with disciplining soldiers while in the performance of their duties and allowed commanders to "see justice done." Articles of War 1776, Section IX, Article I. By comparison, Section X dealt with capital and serious crimes and required the commander to deliver, upon request, the accused soldier to a civil magistrate for prosecution. Articles of War 1776, Section X, Article I.

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[19] F. Maitland, *The Constitutional History of England,* 326-27 (Fisher ed. 1908).

[20] 1 I. MacCauley, *History of England,* 231 (1874 ed.).

[21] Nelson and Westbrook, *Court-martial jurisdiction over servicemen for "civilian" offenses: An Analysis of O'Callahan v. Parker,* 54 Minn. L.Rev. 1, 12-14 (1970).

These sections establish a clear split of jurisdiction between disciplinary violations and serious common law crimes that directly affected the civilian community. They demonstrate a concern by the colonist for allowing the local civilian community to prosecute a crime committed therein and injurying its citizens and an equally important concern that serious crimes be prosecuted by courts according soldiers the same rights as ordinary citizens. Based on this practice, the leading authority on military law in the first century of this country, Colonel Winthrop, stated in his treatise that:

> Where such crimes [as robbery, manslaughter and assault] are committed upon or against civilians not at or near a military camp or post, or in breach of a military duty or order, they are not in general to be regarded as within the description of the Article but are to be treated as civil rather than military offenses.

W. Winthrop, *Military Law and Precedents,* 724 (2d ed. 1896). Thus the framers of the Constitution implemented a court-martial system that was much more limited in scope than the comprehensive, expansive system extant today.

Between the Revolution and the Civil War, the military lacked clear statutory authorization to try soldiers for non-military offenses. In 1863 Congress enacted a statute establishing limited court-martial jurisdiction over certain offenses during time of war. Act of March 3, 1863, ch. 75 § 30, 12 Stat. 731. Thereafter, court-martial jurisdiction was expanded by Congressional enactments with judicial approval, an expansion which eventually led to a rule of status-based jurisdiction. *Ex parte Milligan,* 71 U.S. (4 Wall) 2 (1866); *Kinsella v. Singleton,* 361 U.S. 234 (1960).

The Court's decisions in *O'Callahan* and *Relford* returned the limits of court-martial jurisdiction to that intended by the framers of the Constitution. The Court's recent decision in *Goldman v. Weinberger,* 475 U.S. ____ (1986), should not be construed as precedent for returning to pre-*O'Callahan* standards. In *Goldman* the Court deferred to military interests in promulgating and enforcing administrative regulations. The Court recognized the military's need for uniformity and consistently applied operational standards. In the case *sub judice,* however, the concept of deference is antithetical to

the constitutional definition of jurisdiction. The Court must define the boundaries of military jurisdiction as it was *intended* by the framers of the Constitution and not as it is *desired* by the military. Consequently the concept of deference to the military is not applicable in this context.

B. *Courts-Martial Deprive An Accused Of Numerous Rights And Privileges Guaranteed In Article III Courts And Therefore Should Only Be Convened To Preserve Important Military Needs.*

The Court's opinion in *O'Callahan* balances the importance of an accused's fifth amendment right to grand jury indictment and trial by jury against the legitimate needs of the military within the framework provided by our founding fathers. The service connection requirement of *O'Callahan* is necessary to ensure that this country does not break faith with its tradition of keeping military power subservient to civilian authority. As Justice Black observed in *Reid v. Covert*, 354 U.S. 1, 40 (1957), "this country has remained true to this idea [subservience of military power] for over one hundred and seventy years and even slight encroachments by military courts should not be tolerated."

One of the fundamental rights not afforded the military accused is the right to indictment by grand jury. Unlike the practice in Article III courts, serious charges in the military are investigated by a military officer who ultimately recommends disposition to the convening authority[22] Article 32, UCMJ. Although the procedure is likened to grand jury proceedings by some[23], it is not an independent investigation and cannot be fairly equated with a grand jury. The investigating officer is appointed, usually by the special court-martial convening authority who is usually a commander subordinate to and in the chain of command of the general court-martial convening authority. The general court-martial convening authority is not bound by and can ignore the final recommendations of the investigating officer for any reason. Thus the convening authority can refer charges to a general court-martial even though the investigating officer, and the special court-martial convening authority that appointed him, recommended that the charges be dismissed.[24] Moreover, the commander can completely eliminate the requirement to conduct an Article 32 investigation merely by referring the charges to a special court-martial, which nevertheless has authority to administer severe punishment.[25]

Some critics of *O'Callahan* downgrade the significance of the denial of indictment by a grand jury. Invariably, these commentators point out that the Court did not consider this constitutional right fundamental enough to require states to adopt it through the fourteenth amendment. *See Hurtado v. California*, 110 U.S. 516 (1884). Nevertheless, the grand jury is a meaningful step in the judicial process.[26] This procedure is independent and can effectively screen prosecutions that are motivated by political, racial or other unacceptable reasons. Just as importantly, grand juries give consideration to and apply community notions of fairness and justice when

[22] The position of "convening authority" is unique to military law. The convening authority is a military commander and rarely, if ever, a judge advocate. He is charged by the UCMJ with judicial authority to create a court-martial. *See* Articles 22-24, UCMJ and Dep't of Army, Reg. No. 27-10, *Legal Services-Military Justice*, para. 5-2 (1 July 1984). Because a convening authority is always a commander, his responsibilities extend far beyond the administration of military justice. *See* Dep't of Army, Reg. No. 600-20, *Army Command-Policy and Procedures* (15 November 1980).

[23] *See* Mercer v. Dillon, 19 C.M.A. 264, 41 C.M.R. 264 (1970). *See also* Rice, *O'Callahan v. Parker: Court Martial Jurisdiction, "Service Connection", Confusion, and the Serviceman*, 51 Mil.L.Rev. 11 (Jan. 1971).

[24] *Manual for Courts Martial, United States, 1984*, Rule for Courts-Martial [hereinafter cited as R.C.M.] 405(a) and 407(a), discussion (Recommendations of investigating officer are advisory). Article 34, UCMJ, provides, however, that a commander must receive advice from his staff judge advocate that the specification is supported by evidence.

[25] A special court-martial is empowered to administer, *inter alia*, confinement for six months, a bad conduct discharge, forfeiture of two-thirds pay and reduction to the lowest enlisted rank. Article 19, UCMJ.

[26] Studies have shown that grand juries are not merely rubber stamps for prosecutors. *See* Wickersham, *The Grand Jury: Weapon Against Crime and Corruption*, 51 ABA.J. 1157 (1965).

reviewing charges. Lafave and Israel, *Criminal Procedure,* § 15.2 Grand Jury Review (1980). Far from being an independent investigator, an Article 32 investigating officer is answerable to his superiors for the performance of his duties and thereby subject to subtle military pressures. *See generally United States v. Remai,* 19 M.J. 229, 233 (C.M.A. 1985).

While there is disagreement over the relative importance of the right to grand jury indictment, few critics of *O'Callahan* have attempted to diminish the significance of the right to trial by jury. The composition of courts-martial is fundamentally different from the jury envisioned by the drafters of the sixth amendment. These differences and the shortcomings in the military system prompted Chief Judge Fletcher to make the following observation:

> [C]ourt members, handpicked by the convening authority and of which only four of a required five ordinarly must vote to convict for a valid conviction to result, are a far cry from the jury scheme which the Supreme Court has found constitutionally mandated in criminal trials in both federal and state court systems.

United States v. McCarthy, 2 M.J. 26, 29 n.3 (C.M.A. 1976) (citation omitted). Service members are tried by military officers senior to the accused[27] who are detailed to the court by the convening authority based on their age, education, training, experience, length of service and judicial temperament. Article 25, UCMJ. Other than this broad guidance, there are virtually no constraints on a commander's discretion in appointing members.[28] Consequently, courts-martial rarely

[27] In a change enacted in the Military Justice Act of 1969, Pub. L. No. 90-632, 82 Stat. 1335 (1969), if the accused is enlisted and so requests in writing, the convening authority must detail enlisted members senior in rank to the accused to comprise at least one-third membership of the court. Article 25(c)2, UCMJ.

[28] In a recent case it was discovered that a staff judge advocate recommended to a convening authority that lower enlisted personnel and junior officers be excluded from court-martial panels. The Court of Military Appeals found this conduct inconsistent with Articles 25 and 37, UCMJ. United States v. McClain, 22 M.J. 124 (C.M.A. 1986).

represent a cross section of the military community and by definition are not composed of the accused's peers. The convening authority's discretion goes beyond appointing, for he can also authorize members to serve indefinitely or remove them without cause at any time before the court-martial is assembled. R.C.M. 505(c)(1)(A). Unlike civilian court practice, the accused in military courts is entitled to only one peremptory challenge. Article 41, UCMJ. *See also* R.C.M. 912(g)1.

To convict and sentence an accused the military prosecutor need only obtain the concurrence of two-thirds of the members sitting on a court martial. Article 52(a)2, UCMJ. The authorization of nonunanimous verdicts, coupled with the limited number of members required to compose a court martial,[29] clearly distinguishes the military system of justice from other criminal courts in this country and fails to meet the minimal requirements of the sixth amendment. *See Birch v. Louisiana,* 441 U.S. 130 (1979). *See also Ballew v. Georgia,* 435 U.S. 223 (1978) and *Williams v. Florida,* 399 U.S. 78 (1970). As Justice Black appropriately observed, "[t]he members of a court martial, in the nature of things do not and cannot have the independence of jurors. . . ." *Reid v. Covert,* 354 U.S. at 36.

The sole panacea for depriving the military accused of his constitutional right to trial by jury, one of the citizen's "most vital barriers to governmental arbitrariness," has been to limit court-martial jurisdiction to the minimum necessary.

[29] General courts-martial, which may render unlimited punishment, are required to consist of at least five members. R.C.M. 501(a)(1)(A). Special courts-martial, which are limited in the severity of punishment they can render, are required to have at least three members. R.C.M. 501(a)(2)(A). In either type of court-martial, a two-thirds majority is needed to support a finding of guilty, unless a guilty verdict dictates the death penalty in which case a unanimous verdict is required. R.C.M. 921(c)(3). Consequently, to render a federal conviction and a punitive discharge in a special court-martial, only two of the three "hand picked" members need agree to the accused's guilt. As a further example, a general court-martial may find a soldier guilty of murder under Article 118(1), UCMJ, which requires a minimum life sentence, with only four out of six members concurring in a finding of guilty.

See Reid v. Covert, 354 U.S. at 10 and *Middendorf v. Henry,* 425 U.S. 25 (1976). The court below failed to accord appropriate deference to the significance of this right which will be lost to countless servicemen as military jurisdiction expands over civilian crimes.

As the Court observed in *O'Callahan,* the presiding officer in a court-martial is not a judge whose "objectivity and independence are protected by tenure and undiminishable salary and nurtured by the judicial tradition." *O'Callahan,* 395 U.S. at 264. *See also Toth v. Quarles,* 350 U.S. at 17 and *Palmore v. United States,* 411 U.S. 389 (1973). Currently, military judges in the Army serve for limited periods of time[30] and do not have tenure.[31] Thus, military judges do not have the same opportunity to learn, gain experience and develop judicial temperament as do civilian judges.

The factor which perhaps most distinguishes the military justice system from civilian practice is the degree to which it is subject to the control of the commander. The commander exercises substantial control or influence over the entire court-martial process. Among other powers, the commander is responsible for selecting court members, Article 25, UCMJ, referring charges against the accused, R.C.M. 601(e), granting immunity to accomplices and witnesses, R.C.M. 704, bargaining with the accused over terms of pretrial agreements, R.C.M. 705, and approving the sentence adjudged, R.C.M. 1107.[32] The impartiality which these functions require is not always accorded the military accused.[33]

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[30] According to Army personnel policy, military judges below the rank of Colonel will not be assigned to consecutive tours as military judges. *JAGC Personnel Policies,* Office of the Judge Advocate General, U.S. Army, October 1985, Para. 8-2(b).

[31] Fidell, *Judicial Tenure under the Uniform Code of Military Justice,* 31 Fed. B. News and J. 327 (1984).

[32] For a discussion of the substantial powers retained by the commander in the court-martial process, *see* Cooke, *The United States Court of Military Appeals, 1975-1977: Judicializing the Military Justice System,* 76 Mil.L. Rev. 43 (1977). *See also* Sherman, *Military Justice Without Military Control,* 82 Yale L.J. 1398 (1973).

[33] United States v. Brice, 19 M.J. 170 (C.M.A. 1985); United States v. Miller, 19 M.J. 159 (C.M.A. 1985); United States v. Karlson, 16 M.J. 469 (C.M.A. 1983); United States v. Rosser, 6 M.J. 267 (C.M.A. 1979); United States v. Johnson, 14 C.M.A. 548, 34 C.M.R. 328 (1964); United States v. Kitchens, 12 C.M.A. 589, 31 C.M.R. 175 (1961); United States v. Cruz, 20 M.J. 873 (A.C.M.R. 1985), *pet. granted,* 22 M.J. 100 (C.M.A. 1986); United States v. Treakle, 18 M.J. 646 (A.C.M.R. 1984), *pet. granted,* 20 M.J. 131 (C.M.A. 1986); United States v. Yslava, 18 M.J. 670 (A.C.M.R. 1984), *pet. granted,* 19 M.J. 281 (C.M.A. 1985); United States v. Rodriquez, 16 M.J. 740 (A.F.C.M.R. 1983); United States v. Toon, 48 C.M.R. 139 (A.C.M.R. 1973).

Illegal command influence can deny an accused his constitutional right to a fair trial. *See, e.g., Homcy v. Resor,* 455 F.2d 1345 (D.C. Cir. 1971). However, despite this recognition and the continued efforts of Congress[34] to eradicate the problem, courts-martial have not been and will not likely ever be free from unlawful influence. The military justice system's demonstrated vulnerability to illegal command influence presents a significant danger to the military accused's ability to receive a fair trial. It is well established that unlawful command influence "may assume many forms, may be difficult to uncover, and affects court members in unsuspecting ways." *United States v. Karlson,* 16 M.J. at 474, *citing* H. Moyer, *Justice and the Military,* § 3-100–§ 3-400 (1972). The persistent and prevalent nature of unlawful command influence in the administration of military justice makes any fair comparison between trial in military and civilian courts impossible.

C. *No Compelling Reasons Exist For The Court To Modify Or Overrule The Service Connection Test.*

There have been no improvements in the military justice system which justify a modification of *O'Callahan* and

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[34] "Congress has clearly recognized that unlawful command influence on the members of a court-martial has a pernicious effect not only on Military Justice but on discipline and morale as well." United States v. Karlson, 16 M.J. 469, 474 (C.M.A. 1983) (citations omitted). Article 37, UCMJ specifically provides that "[n]o person subject to this chapter may attempt to coerce or, by any unauthorized means influence the action of a court-martial . . . in reaching the findings or sentence in any case." *See also* Article 98, UCMJ.

Relford.[35] Although the military justice system has improved since *O'Callahan* was decided, the system nevertheless does not and perhaps by its nature can not provide a judicial forum with the same constitutional degree of fairness as a trial in Article III courts. As the Court has so aptly stated, "military tribunals have not been and probably never can be constituted in such a way that they can have the same kind of qualifications that the constitution has deemed essential to fair trials of civilians in federal courts." *Toth v. Quarles,* 350 U.S. at 17. It simply cannot be overlooked that the military courts are executive tribunals composed entirely of personnel who are in the executive chain of command. *See Reid v. Covert,* 354 U.S. at 36.

Many of the improvements in the military justice system were accomplished by the passage of the Military Justice Act of 1969.[36] These improvements did not rectify the constitutional deficiencies identified in *O'Callahan* and discussed *infra.* The military justice system continues to be used primarily as an instrument to preserve discipline, a purpose that will not likely change considering the military's important mission of protecting this country.

Some judges, legal scholars and military officials sharply critized the *O'Callahan* decision because they feared the opinion would result in a breakdown in discipline and eventually lower the overall image and effectiveness of the military services. *See O'Callahan,* 395 U.S. at 274 (Harlan, J., dissenting). These fears, however, have proven groundless. Our military services are stronger today than when *O'Callahan* was decided. Casper W. Weinberger, Secretary

[35] The suggestion that improvements in the military justice system justify a modification of the service connection test was first advanced by Senator Sam Ervin in remarks to the Senate, 115 Cong. Rec. 17267 (1969). Several authors have called for reexamination of *O'Callahan. See* Everett, *O'Callahan v. Parker–Milestone or Millstone in Military Justice,* 1969 Duke L. J. 853 (1969) and Nelson and Westbrook, *Court-Martial Jurisdiction over servicemen for civilian offenses: An analysis of O'Callahan v. Parker, supra.*

[36] Pub. L. No. 90-632, 82 Stat. 1335. Among other advances, this legislation gave military accused the right to be represented by qualified counsel, to request trial by military judge alone, the right of enlisted soldiers to request at least one third enlisted members and the right to all accused pending trial by special court-martial to be represented by qualified counsel.

of Defense, recently testified before the House Armed Services Committee that "[a]ll the services now are exceeding their recruiting goals . . . ." Department of Defense Authorization of Appropriations for Fiscal Year 1986: Hearings on H.R. 1872 Before the Committee on Armed Services, 99th Cong., 1st Sess. 13 (1985). General John W. Vessey Jr., Chairman of the Joint Chiefs of Staff, stated, "In contrast to about 10 years ago when 25 percent of the force was careerist, today about 50 percent of the force are careerist . . . ." *Id.* at 327. John O. Marsh, Jr., Secretary of Army, and General John A. Wickham, Jr., Chief of Staff of the Army, both testified that recruitment of high school graduates has steadily increased over the last six years while the four indices of indiscipline, *i.e.,* unauthorized absence, desertion, violent crimes against persons and crimes against property, have all decreased in the last ten years. *Id.* at 419, 420, 431, 513.[37] Although the military success in recruitment and reducing indiscipline can not be directly attributable to *O'Callahan,* it clearly shows that application of the service connection analysis has not been harmful to the maintenance of military discipline.

The military services have a special interest in maintaining forces which are disciplined and which have respect for the law. This interest can be adequately met in most instances without unnecessarily abridging soldiers' constitutional rights by subjecting them to trial by courts-martial for civilian offenses. If, as a result of a proper application of the service connection test, a soldier is prosecuted in state or federal court, the military can exercise its broad powers to administratively separate the undesirable soldier.[38]

[37] In an article based on his congressional testimony on Feb. 27, 1986, before the House Armed Services Sub-committee on Military Personnel and Compensation, the Assistant Secretary of Defense (Force Management and Personnel) Chapman B. Cox states that, "[m]ajor deficiencies in the quality and quantity of the active component which prevailed in the late 1970's have been corrected in the last five years. We now have a well trained, well balanced, well motivated, well disciplined force." Cox C., *Manpower and the Total Force, Defense '86,* Soldier Magazine, p.24 (May-June 1986).

[38] *See, e.g.,* Dep't of Army, Reg. No. 635-200, *Personnel Separations-Enlisted Personnel,* chapter 14, (1 October 1982). Other services have comparable discharge regulations.

Some critics of *O'Callahan* argued that it advanced an unworkable standard which would spawn uncertainty and confusion in defining the limits of court-martial jurisdiction.[39] These concerns proved to be unfounded as the Court of Military Appeals quickly developed the *O'Callahan–Relford* test into well-defined, workable standards. Unfortunately, the Court of Military Appeals' recent expansion beyond the limits of this established body of law has generated uncertainty and confusion surrounding military jurisdiction. This development is not, however, a product of *O'Callahan* and *Relford.* Rather, it stems from the willingness of military appellate courts to disregard precedent and chart a new course which does not follow the map furnished by the Court in *O'Callahan* and *Relford.*

While new developments in society may justify a reexamination of *O'Callahan*, the only "new development" cited by the court below was the increased concern for victim's rights. *Solorio,* 21 M.J. at 254. This is not the type of new development that triggers such a reexamination. The increased concern for victim's rights which the court below relied upon to reexamine its precedent is not a purely military phenomenon. Civilian courts are fully capable and willing to prosecute and punish military personnel who may commit civilian offenses. The military courts are in no better position to protect the rights of victims than state and federal courts and are in a far weaker position to protect the rights of the accused. In fact, it may be persuasively argued that the services lack the stable and hence experienced foundation existent in state-run victim assistance programs. Moreover, the interests the federal, state and military courts seek to vindicate remain substantially the same as they did when *O'Callahan* was decided.

CONCLUSION

The decision in this case constitutes an unwarranted and unconstitutional extension of court-martial jurisdiction which transcends the limits set forth by the Court in *O'Callahan* and

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[39] *See* Everett, *O'Callahan v. Parker–Milestone or Millstone in Military Justice, supra.*

Relford. Petitioner's Alaskan offenses are not sufficiently service connected to meet the *O'Callahan–Relford* guidelines and, accordingly, the exercise of military jurisdiction in this case was constitutionally improper.

The Court's decision in *O'Callahan* strikes an appropriate balance between the competing interest of the military and the rights of American citizens in uniform. The military justice system is considerably different from the civilian court system and does not provide certain fundamental constitutional rights to the accused. The *O'Callahan* decision correctly interprets the Constitution, rests on sound policy and rationale and sets forth a workable, realistic foundation for determining the appropriate sphere of military jurisdiction. There exists no sound or compelling reason to modify the standards set forth seventeen years ago. Indeed, the Court should take this opportunity to reaffirm the continued vitality of *O'Callahan* and the principle that soldiers will be afforded their constitutional right to accusation and trial by civilian courts for offenses which are not service connected.

Accordingly the lower court should be reversed and the Alaskan charges dismissed.

Respectfully submitted,

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APPENDIX

UNITED STATES ARMY COURT
OF MILITARY REVIEW

Miscellaneous Docket No. 1986/1
U.S. Army Aviation Center and Fort Rucker
S.L. Trail, Military Judge

UNITED STATES, APPELLANT

v.

STAFF SERGEANT RANDY W. J. ABELL, 516-72-8041,
UNITED STATES ARMY, APPELLEE

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11 March 1986

Before YAWN, WILLIAMS, and KENNETT, Appellate Military Judges

For Appellant: Colonel James Kucera, JAGC, Lieutenant Colonel Adrian J. Gravelle, JAGC, Lieutenant Colonel Joseph A. Rehyansky, JAGC (on brief).

For Appellee: Colonel Brooks B. La Grua, JAGC, Lieutenant Colonel William P. Heaston, JAGC, Major Eric T. Franzen, JAGC, Captain David W. Sorensen, JAGC (on brief).

MEMORANDUM OPINION

Per Curiam:

Pursuant to Article 62, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 862 (Supp. I 1983), and in accordance with Rule for Courts-Martial 908, Manual for Courts-Martial, United States, 1984, the government appeals the trial judge's ruling that the military lacks subject matter jurisdiction over the offenses alleged in the case.

Appellee was arraigned at a general court-martial at Fort Rucker, Alabama, on three specifications alleging indecent acts with children under the age of 16 years, violations of Article 134, UCMJ. The facts show, *inter alia,* the alleged offenses occurred in appellee's trailer at a trailer court in Daleville, Alabama. The trailer court is located adjacent to Fort Rucker, separated from the installation by a railroad track, but six to eight miles from the main cantonment. Each of the alleged victims were dependents of soldiers and resided in the same trailer court as did the accused. Approximately 80 percent of the residents of this trailer court consisted of soldiers and their dependents. No evidence was presented, however, showing any contact or activity between the appellee and the alleged victims or their military fathers occurring on Fort Rucker.

Having reviewed the record and carefully considered briefs filed by both the government and the appellee, we conclude that the offenses alleged are "service connected" and that the military judge erred by dismissing them for lack of subject matter jurisdiction. *United States v. Solorio,* 21 M.J. 251 (CMA 1986).

The appeal of the United States pursuant to Article 62, UCMJ, is granted. Accordingly, the ruling of the military judge dismissing the charge and specifications is vacated, and the record will be returned to the military judge for action not inconsistent with this opinion.

For the Court:

/s/ WILLIAM S. FULTON, JR.
William S. Fulton, Jr.
Clerk of Court

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